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Deborah A. Schmedemann

Mitchell Hamline School of Law, deborah.schmedemann@mitchellhamline.edu

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Working Backwards: The Covenant of Good Faith and Fair Dealing in Employment Law

Abstract

This article examines the covenant of good faith and fair dealing with respect to employment law. This doctrine is at an interesting stage in its development (or decline) in Minnesota and elsewhere. The article begins with the standard exposition of the current state of the law; part I describes the limited scope of the covenant and its limited force in Minnesota employment law. Part II contains my assessment of the courts' handling of the covenant and the promise this theory holds for Minnesota employees and employers. My theses are: First, the courts have thus far failed to develop a sound theory of the covenant of good faith and fair dealing because they have approached the problem backwards. Second, the real promise of the covenant--if defined to focus on faithfulness to the parties' bargain--is its potential to prompt employers to act in good faith not only at the time of discharge, but also during the employment relationship.

Keywords

Employment discharge, termination of employment, employee's duty, terms of employment, Minnesota employees, bad faith, job security

Disciplines

Contracts | Labor and Employment Law

WORKING BACKWARDS: THE COVENANT OF GOOD FAITH AND FAIR DEALING IN EMPLOYMENT LAW

DEBORAH A. SCHMEDEMANNT

INTRODUCTION

Consider this scenario:¹ The employee, with both a law degree and advanced degrees in engineering, worked as an attorney for a large Minnesota computer corporation and specialized in patent law. He did not perform well. Despite his solid technical legal skills and hard work, he did not get along well with his co-workers or the managers who were his "clients," he did not complete work promptly, and he made different judgment calls than his supervisors would have made in a number of situations.

His supervisors perceived these weaknesses shortly after the lawyer started work. However, they believed he had potential, and people with his credentials were scarce. To encourage him, they gave him satisfactory or better marks on his performance reviews. His supervisors provided him guidance and indications of his weaknesses informally.

After a year, when these efforts did not produce results, the supervisors consulted with the human resources director, who recommended that they continue the informal evaluations and be more straightforward in the next performance review. Nonetheless, the supervisors determined that they did not wish

† Professor of Law, William Mitchell College of Law. B.A. Stanford University 1977; J.D. Harvard Law School 1980. I first presented much of this material in this article at the Homecoming program on Good Faith in the Law sponsored by the College in the fall of 1989. My thinking on this topic has benefitted from the comments of four of my colleagues during that program: Jack Davies, Douglas Heidenreich, Daniel Kleinberger, and Christina Kunz. I wish to further thank Daniel for his careful reading of an early draft of this essay. My thanks also go to the two research assistants who worked on the presentation and this essay: Patrice Arseneault, class of 1989, and Martha Sieber, class of 1992.

1. The scenario is loosely inspired by *Makhsoos v. 3M Co.*, No. C6-86-480456 (Ramsey County Dist. Ct. May 8, 1989) (decided by Judge George D. Petersen). Until recently, wrongful discharge litigation involving attorneys was almost unheard of. That situation has changed with the trial and jury verdict of *Brooks v. Doherty, Rumble & Butler*. See Carr, *Doherty's Pink Slip*, 5 MINN. LAW. Apr.-May 1990, at 14.

to give the lawyer low ratings for fear that he would react angrily or carry a stigma. And so the satisfactory or better performance ratings and informal guidance continued.

When the lawyer's two-year anniversary approached without improved performance, his exasperated supervisors placed him on probation. They gave him two months in which to correct a list of deficiencies. When he did not do so, he was discharged.

Assume that the lawyer did not have an individual employment contract, but the company had issued an employee handbook. The handbook included a description of the corporation's "performance assessment system," calling for regular performance reviews and probation before termination. This description began: "The corporation intends to follow these procedures with all employees, so as to ensure each employee's best performance." The supervisors did follow these procedures.

The lawyer may feel that his termination was not "fair." The legal claim which best captures his feeling is breach of the covenant of good faith and fair dealing. This doctrine is at an interesting stage in its development (or decline) in Minnesota and elsewhere.²

This essay begins with the standard exposition of the current state of the law; part I describes the limited scope of the covenant and its limited force in Minnesota employment law. Part II contains my assessment of the courts' handling of the covenant and the promise this theory holds for Minnesota employees and employers. My theses are: First, the courts have thus far failed to develop a sound theory of the covenant of good faith and fair dealing because they have approached the problem backwards. Second, the real promise of the covenant—if defined to focus on faithfulness to the parties' bargain—is its potential to prompt employers to act in good faith not only at the time of discharge, but also during the employment relationship.

2. The major decision in Minnesota, *Hunt v. IBM Mid America Employees Fed. Credit Union*, 384 N.W.2d 853 (Minn. 1986), is not yet five years old. Perhaps the most prominent case in this area, if only because it sets the law for the state of California, *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988), is only two years old. *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977), at thirteen years, is a dated decision in this area.

I. THE COVENANT OF GOOD FAITH AND FAIR DEALING AS OF 1990

A. Context

The breach of the covenant of good faith and fair dealing has limited force in Minnesota law. The covenant binds the employer, not the employee. Its focus is the decision to discharge an employee, rather than decisions on promotions, demotions, transfers, discipline, compensation, or working conditions. Finally, the covenant of good faith and fair dealing is not the primary restriction on discharge, but rather serves as a supplement to other, better established rules.

1. *The Employee's Duty Towards the Employer*

Employees do, of course, owe some duty to employers. As the Minnesota Supreme Court recently wrote: "Every employment contract encompasses implied duties of honesty and loyalty" on the employee's part.³ This principle comes into play when employers resist employee suits for compensation⁴ and when employers sue employees for various forms of unfair competition.⁵

These principles of loyalty to the employer have not, for the most part, made their way into the case law on discharge. This may be because the employer reacts to an employee's failure to fulfill these duties not by litigation but by self-help, namely discharge. It is the employee who must sue to contest bad faith actions. Nonetheless, in one California case, the employer as-

3. *Stiff v. Associated Sewing Supply Co.*, 436 N.W.2d 777, 780 (Minn. 1989).

4. For example, the supreme court recently determined that an employee forfeited his right to unpaid commissions when he embezzled company funds and conspired to dismantle the employer's record systems. *Id. Compare Marsh v. Minneapolis Herald, Inc.*, 270 Minn. 443, 134 N.W.2d 18 (1965) (an employee did not forfeit his right to overtime compensation on grounds of disloyalty by working for another employer without the permission of the first, keeping a secret and inaccurate record of his hours, and being marginally involved in an unsuccessful effort to take over his employer).

5. An employee may not use the employer's trade secrets for his or her own advantage or the advantage of a third party. *See MINN. STAT. §§ 325C.01-.08* (1988). An employee may not compete with the employer or solicit the employer's customers for the employee's new business while still employed. *Rehabilitation Specialists, Inc. v. Koering*, 404 N.W.2d 301 (Minn. Ct. App. 1987). In addition, an employer and employee may enter into a restrictive covenant reasonably limiting the employee's competition with the employer after the employee leaves. *E.g., Bennett v. Storz Broadcasting Co.*, 270 Minn. 525, 134 N.W.2d 892 (1965).

serted the employee's lack of good faith towards the employer as a counterclaim to the employee's claim that the employer had breached its covenant of good faith and fair dealing.⁶ The court rejected the claim, reasoning that the good faith cause of action belonged only to the weaker party, namely the employee.⁷

2. *Regulation of Terms of Employment*

The covenant of good faith and fair dealing primarily addresses the employer's decision to terminate the employee, rather than the terms of the employment relationship.⁸ There appear to be two reasons for this limited reach.

First, other principles of state and federal law combine to cover many aspects of the employment relationship.⁹ For example by statute, Minnesota regulates wages and hours,¹⁰ safety and health,¹¹ parental¹² and jury¹³ leave, work breaks,¹⁴ drug¹⁵ and polygraph¹⁶ testing, and access to personnel records.¹⁷ The Minnesota Human Rights Act forbids discrimination in many employer actions during the relationship on such bases as race, gender, religion, disability, and marital status.¹⁸ The statute proscribes harassment based on protected

6. *Hudson v. Moore Business Forms*, 609 F. Supp. 467 (N.D. Cal. 1985), *aff'd in part and vacated in part*, 836 F.2d 1156 (9th Cir. 1987).

7. *Id.* at 479. For commentary on Hudson and the validity of such a counterclaim, see Comment, *The Implied Covenant of Good Faith and Fair Dealing: Examining Employees' Good Faith Duties*, 39 HASTINGS L.J. 483 (1988) (by Jeffrey Judd).

8. The rare exception that proves the general rule is *Lee v. Metropolitan Airport Comm'n*, 428 N.W.2d 815 (Minn. Ct. App. 1988), where an employee challenged MAC's failure to promote her promptly; she did not succeed on her covenant of good faith claim.

9. For an overview of the field of employment law, see S. ESTREICHER & M. HARPER, *CASES AND MATERIALS ON THE LAW GOVERNING THE EMPLOYMENT RELATIONSHIP* (1990), M. FINKIN, A. GOLDMAN & C. SUMMERS, *LEGAL PROTECTION FOR THE INDIVIDUAL EMPLOYEE* (1989), and M. ROTHSTEIN, A. KNAPP & L. LIEBMAN, *CASES AND MATERIALS ON EMPLOYMENT LAW* (1987).

10. MINN. STAT. §§ 177.21-.35 (1988 & Supp. 1989).

11. MINN. STAT. §§ 182.65-.675 (1988 & Supp. 1989).

12. MINN. STAT. §§ 181.940-.944 (1988).

13. MINN. STAT. § 593.50 (1988); *see also id.* § 202A.135, 204B.195, 204C.04 (various political activities).

14. MINN. STAT. §§ 177.253, 177.254 (1988 & Supp. 1989).

15. MINN. STAT. §§ 181.950-.957 (1988).

16. MINN. STAT. §§ 181.75-.76 (1988).

17. MINN. STAT. §§ 181.960-.966 (Supp. 1989).

18. *See* MINN. STAT. §§ 363.01-.03 (1988 & Supp. 1989). The other protected classes are color, creed, national origin, age, and status with regard to public assist-

class status.¹⁹ Several statutes prohibit retaliation in employment terms for an employee's assertion of his or her statutory rights or actions in accord with the public interest.²⁰

A disgruntled employee may also employ quite a range of standard common law causes of actions in challenging an employer's actions during the relationship.²¹ Perhaps these specific rules expressly prohibit most bad faith actions during the ongoing relationship.

Second it may simply be that employees choose only rarely to contest adverse actions short of discharge. There is less to be won by the employee through litigation over actions short of discharge—and much to lose if the employer takes offense at the lawsuit (which is almost inevitable). Perhaps employees perceive that the courts are more resistant to these cases, for much the same reasons.²²

3. Regulation of Termination of Employment

The covenant of good faith does not constitute the primary restriction on the employer's decision to discharge an em-

ance. *Id.* § 363.03, subd. 1(2). Employers may not discriminate in "hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment." *Id.* § 363.03, subd. 1(2)(c).

19. *Id.* § 363.01, subd. 10a (definition of sexual harassment); *see also* *Lamb v. Village of Bagley*, 310 N.W.2d 508 (Minn. 1981) (racial harassment).

20. *E.g.*, MINN. STAT. § 181.932, subd. 1 (1988) (covering whistleblowing, testifying before government bodies, refusing to engage in illegal conduct); *id.* § 177.32, subd. 2 (1988) (Fair Labor Standards Act); *id.* § 182.669 (1988 & Supp. 1989) (Occupational Safety and Health Act).

21. *See, e.g.*, *Goodkind v. University of Minnesota*, 417 N.W.2d 636 (Minn. 1988) (breach of contract claim); *Lee v. Metropolitan Airport Comm'n*, 428 N.W.2d 815 (Minn. Ct. App. 1988) (discussing claims of defamation, breach of contract, interference with contractual rights, negligent infliction of emotional distress); *Bohdan v. Alltool Mfg. Co.*, 411 N.W.2d 902 (Minn. Ct. App. 1987) (discussion of invasion of privacy, defamation, negligent and intentional infliction of emotional distress). As these cases demonstrate, Minnesota does not yet recognize invasion of privacy, and the intentional tort claims tend to fare better than claims based on negligence.

22. The plaintiffs in the cases cited in note 21 *supra*, lost for the most part. *See* *Rutan v. Republican Party of Illinois and French v. Rutan*, 868 F.2d 943 (7th Cir.), *cert. granted*, 110 S. Ct. 48 (1989) (Do constitutional restrictions on patronage practices extend to denials of promotion, transfer, recall from lay-off and hiring?). *Editors' note*: The Supreme Court has decided that constitutional restrictions on patronage practices *do* extend to denials of promotion, transfer, recall from lay-off and hiring. *Rutan v. Republican Party of Illinois and French v. Rutan*, 58 U.S.L.W. 4872 (U.S. June 21, 1990).

ployee.²³ Some employees are protected from discharge not based on good cause by union contracts,²⁴ individual contracts,²⁵ or civil service statutes.²⁶ Employees lacking these protections are deemed "at-will" employees. Employers have traditionally been able to discharge an at-will employee at any time and for any reason.²⁷ More recently, however, legislatures and courts have granted even at-will employees some legal recourse.

Federal and state law combine to prohibit certain bases for discharge.²⁸ For example, by statute, Minnesota prohibits discharge because of the employee's membership in a protected class.²⁹ Minnesota's "whistleblower act" protects employees who report actual or suspected violations of the law, testify before government bodies, or refuse to engage in illegal conduct requested by the employer.³⁰ Several statutes prohibit retaliation against employees who pursue their statutory rights as to terms of employment.³¹ The new drug testing statute regulates terminations based on results of drug screens.³²

In addition, there are common law remedies for some discharges. The most offensive discharges are tortious, being violations of public policy³³ or constituting intentional infliction of emotional distress, however.³⁴ Actions based in negligence have not succeeded.³⁵ Some employees may have an implied

23. The focus of this essay is discharge for reasons relating to the employee or his or her performance, not termination for economic reasons.

24. Eighty-six percent of collective bargaining agreements include clauses on just cause. 2 Collective Bargaining Negot. and Cont. (BNA) 40:1 (Mar. 9, 1989).

25. For Minnesota law in the general area of express individual contracts, see *Fischer v. Pinski*, 309 Minn. 202, 243 N.W.2d 733 (1976) (construing clauses on renewals and notices of cancellation); *House v. Baxter*, 383 N.W.2d 717 (Minn. Ct. App. 1986) (construing an expiration clause).

26. *E.g.*, MINN. STAT. § 43A.33 (1988) (state employees); *id.* § 125.12 (1988 & Supp. 1989) (teacher tenure statute).

27. *See, e.g.*, *Pine River State Bank v. Mettelle*, 333 N.W.2d 622, 627 (Minn. 1987).

28. See the sources cited in note 20 *supra*.

29. MINN. STAT. § 363.03, subd. 1(2) (1988 & Supp. 1989).

30. MINN. STAT. § 181.932, subd. 1 (1988).

31. MINN. STAT. § 363.03, subd. 7 (1988 & Supp. 1989) (Human Rights Act); *id.* § 177.32, subd. 2 (Fair Labor Standards Act); *id.* § 182.669 (Occupational Safety and Health Act); *id.* § 176.021 (workers' compensation statute).

32. MINN. STAT. § 181.953, subd. 10 (1988).

33. *Phipps v. Clark Oil & Ref. Corp.*, 408 N.W.2d 569 (Minn. 1987); *Freidrichs v. Western Nat'l Mut. Ins. Co.*, 410 N.W.2d 62 (Minn. Ct. App. 1987).

34. *See Hubbard v. UPI*, 330 N.W.2d 428 (Minn. 1983).

35. *See, e.g.*, *Stowman v. Carlson Cos.*, 430 N.W.2d 490 (Minn. Ct. App. 1988)

contract cause of action based on unilateral employer promises as to reasons for discharge or procedures to be followed; the typical source of these promises is an employee handbook.³⁶ Given the right facts, an employee may even have a cause of action for promissory estoppel.³⁷

Despite this seemingly wide array of causes of action, Minnesota law does not yet broadly grant employees the right to be fired only "in good faith" or only "for good cause."

B. The Covenant of Good Faith and Fair Dealing

The Minnesota Supreme Court and Court of Appeals³⁸ have developed the law on the covenant of good faith and fair dealing by asking and in some cases, answering these questions, in this order: How is the covenant created? How is "good faith" defined, and what would constitute breach of the covenant? What are the consequences of breach?

1. Creation of the Covenant

The courts have moved cautiously, but nonetheless effectively, to make it unlikely that an employee will successfully assert the covenant of good faith against an employer.

In 1975, in *Wild v. Rarig*,³⁹ the supreme court addressed the covenant of good faith in a grantor-grantee context. The court

(rejecting negligent hiring); *Jeffers v. Convoy Corp.*, 336 F. Supp. 1337 (D. Minn. 1986) (rejecting negligent infliction of emotional distress).

36. *Pine River State Bank v. Mettelle*, 333 N.W.2d 622 (Minn. 1983). The theory could apply as well to oral statements regarding job security. *Rognlien v. Carter*, 443 N.W.2d 217 (Minn. Ct. App. 1989).

37. *Grouse v. Group Health Plan, Inc.*, 306 N.W.2d 114 (Minn. 1981); *Eklund v. Vincent Brass & Aluminum Co.*, 351 N.W.2d 371 (Minn. Ct. App. 1984), *pet. for review denied* (Nov. 1, 1984).

38. For a representative sample of good faith cases from around the country, see *Wagenseller v. Scottsdale Memorial Hosp.*, 147 Ariz. 370, 710 P.2d 1025 (1985) (covenant is implied in law but does not override at-will employment); *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988) (covenant implied as a matter of law, sounding in contract); *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977) (covenant recognized where the employer's acts would deprive the employee of earned compensation); *Gates v. Life of Montana Ins. Co.*, 196 Mont. 178, 638 P.2d 1063 (1982) (implied covenant of good faith which could lead to punitive damages); *Murphy v. American Home Products Corp.*, 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983) (no implied duty of good faith, although the parties may expressly limit the employer's ability to discharge); *Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 335 N.W.2d 834 (1983) (refusing to recognize a duty to terminate only in good faith).

39. 302 Minn. 419, 234 N.W.2d 775 (1975), *cert. denied*, 424 U.S. 902 (1976).

noted that the covenant is implied in other contexts—and then decided the case without deciding whether to extend the covenant to that case.⁴⁰

Just over ten years later, in *Hunt v. IBM Mid America Employees Federal Credit Union*,⁴¹ a true employment case, the court cited *Wild* for this statement: “[W]e have not read an implied covenant of good faith and fair dealing into employment contracts.”⁴² The statement refers to the covenant as implied by force of the law,⁴³ and *Hunt* now stands for the proposition that the covenant is not thus inherent in Minnesota employment contracts.⁴⁴ The supreme court cited decisions from other states which reject the covenant.⁴⁵ The court expressed concern about the imposition of the courts, burdens on employers, and the intrusion of the judiciary into the employment relationship that would occur should the covenant be recognized—as well as a jurisprudential concern about “judicial incursions into the amorphous concept of bad faith.”⁴⁶ The court also noted that the task of creating the covenant should be one for the legislature.⁴⁷

On the other hand, the court in *Hunt* also examined the “facts and circumstances” of that case, indicating a willingness to recognize the covenant where the specific situation gives rise to it. The court’s review of the facts covered a wide range: the hiring and employment of Hunt, the employee manual, the evaluations of his work, the statements of his supervisors, and the duration of his employment. As to the manual, the court looked to the law on unilateral contracts; the court determined

40. *Id.* at 440–42, 234 N.W.2d at 789–90. *Cf.* *Mason v. Farmers Ins. Co.*, 281 N.W.2d 344, 347 (Minn. 1979) (no cause of action for termination in bad faith where an insurance agency contract indicated that it could be cancelled without cause).

41. 384 N.W.2d 853 (Minn. 1986).

42. *Id.* at 858.

43. Elsewhere in the opinion, the court discussed an implied-in-fact covenant. *See infra* notes 46–47 and accompanying text.

44. *See, e.g.*, *Stowman v. Carlson Cos.*, 430 N.W.2d 490, 494 (Minn. Ct. App. 1988); *Lee v. Metropolitan Airport Comm’n*, 428 N.W.2d 815, 822 (Minn. Ct. App. 1988).

45. *Hunt*, 384 N.W.2d at 858–59, *citing* *Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 652 P.2d 625 (1982); *Murphy v. American Home Products Corp.*, 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 293 (1983); *Thompson v. St. Regis Paper Co.*, 102 Wash. 2d 219, 685 P.2d 1081 (1984); *Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 335 N.W.2d 834 (1983).

46. *Hunt*, 384 N.W.2d at 858 (quoting *Parner*, 65 Haw. at 377, 652 P.2d at 629).

47. *Hunt*, 384 N.W.2d at 859.

that the statements in the manual were mere statements of general policy and therefore insufficiently definite to give rise to an offer of unilateral contract or a covenant of good faith.⁴⁸

The 1990 decision in *Knudsen v. Northwest Airlines, Inc.*⁴⁹ provides helpful, if unsurprising, insight into how to avoid the implication of the covenant of good faith. The employee was terminated shortly before certain stock rights vested and sued for breach of the stock option contract. The court had little difficulty finding no covenant existed because the agreement clearly indicated that it expired when an employee ceased to be employed in a covered position "for any reason."⁵⁰ The court deemed the language a "facially unrestrictive termination provision" permitting termination with or without cause.⁵¹

While the court of appeals has generally followed the supreme court's lead in declining to find an implied-in-fact covenant,⁵² the intermediate court has occasionally overturned summary judgment for the employer on this issue. In one interesting case, *Eklund v. Vincent Brass & Aluminum Co.*,⁵³ the court seemed persuaded by very favorable facts for the employee. Eklund had moved to the employer from a well-established position elsewhere; he was told that the position would be permanent, so long as he performed satisfactorily. He received regular raises and bonuses; indeed he was considered for company president. Then the new president fired him (as well as another unsuccessful candidate for the presidency) on the grounds that they did not have a good relationship, others lacked confidence in him, and his personal problems interfered with his work.⁵⁴ The court remanded to allow Eklund to establish an express contract "limiting his dismissal to good faith reasons" or factors implying the covenant of good faith.⁵⁵

48. *Id.* at 858.

49. 450 N.W.2d 131 (Minn. 1990).

50. *Id.* at 133.

51. *Id.*

52. *E.g.*, *Stowman v. Carlson Cos.*, 430 N.W.2d 490 (Minn. Ct. App. 1988); *Lee v. Metropolitan Airport Comm'n*, 428 N.W.2d 815 (Minn. Ct. App. 1988); *Simonson v. Meader Distrib. Co.*, 413 N.W.2d 146 (Minn. Ct. App. 1987); *Bakker v. Metropolitan Pediatric, Inc.*, 355 N.W.2d 330 (Minn. Ct. App. 1984). *See also* *Harris v. Mardan Business Sys., Inc.*, 421 N.W.2d 350 (Minn. Ct. App. 1988), *pet. for review denied* (May 19, 1988) (refusing to imply a duty of good faith regarding termination into a stock purchase agreement which provided for termination without conditions).

53. 351 N.W.2d 371 (Minn. Ct. App. 1984), *pet. for review denied* (Nov. 1, 1984).

54. *Id.* at 374.

55. *Id.* *Cf.* *Rognlien v. Carter*, 443 N.W.2d 217 (Minn. Ct. App. 1989).

Eklund was decided before *Hunt*, and the supreme court denied review.

More recently, in *Bratton v. Menard, Inc.*,⁵⁶ the employer had promulgated two conflicting documents: a progressive discipline policy in a handbook and an individual agreement, signed by the employee, that he served at will and would indeed lose any year-end bonus if he was not employed when the bonus was due to be paid. The employee was fired shortly before his bonus came due.⁵⁷ The court determined that he should be afforded the opportunity to prove to the jury that the handbook required "good faith in discharge" and that the dismissal was in bad faith.⁵⁸

The rule of these cases is that the covenant is not implied as a matter of law, but the parties may create the covenant through their relationship. Based on the outcomes of the cases, it is fair to say that the courts will rarely find the covenant to exist.

2. Definition of "Good Faith" and Breach

Despite the concentrated efforts of the courts in determining when and how the covenant of good faith and fair dealing is created, the definition of "good faith" (much less "fair dealing") remains obscure. Several ideas do appear in dictum in the cases.

In *Wild*, the plaintiff equated a lack of good faith with malice. And the court repeated the equation.⁵⁹

In *Hunt*, however, the court seemed to equate good faith with "discharge for cause only."⁶⁰ The same equation appears in *Knudsen*.⁶¹ At the same time, the *Hunt* court noted that the plaintiff had not asserted that the discharge was "retaliatory" or "abusive."⁶²

The court of appeals seemed influenced by the facts of the discharges in determining that there might be a covenant of

56. 438 N.W.2d 116 (Minn. Ct. App. 1989).

57. *Id.* at 117.

58. *Id.* at 119.

59. *Wild v. Rarig*, 302 Minn. 419, 234 N.W.2d 775, 790 (1975), *cert. denied*, 424 U.S. 902 (1976).

60. *Hunt v. IBM Mid America Employees Fed. Credit Union*, 384 N.W.2d 853, 858 (Minn. 1986).

61. *Knudsen v. Northwest Airlines, Inc.*, 450 N.W.2d 131, 133 (Minn. 1990).

62. *Hunt*, 384 N.W.2d at 856.

good faith breached in *Eklund* and *Bratton*.⁶³ It is not clear, however, what precisely in these facts indicates a lack of good faith.

One of the more interesting insights into bad faith comes indirectly from the response of the jury and the dissenting justices to the facts of *Lewis v. Equitable Life Assurance Society*.⁶⁴ The employees there were sent out of town on business and given travel advances, with no instructions on how to spend the funds. When the employees returned, having performed well, they were repeatedly pressured to return a portion of the funds; they also were given conflicting explanations about company policy on travel expenses. When the employees refused to return \$200 each, they were fired for gross insubordination. The jury found for the employees on a standard contract claim—even though there was no clearcut breach of the employee handbook.⁶⁵ The supreme court upheld the verdict.⁶⁶

The dissenters speculated that the erroneous instruction given concerning an implied covenant of good faith⁶⁷ influenced the jury's decision.⁶⁸ As Justice Kelley pointed out in his dissent, the company fired the employees "in a shoddy, callous, and perhaps even deceiving manner," prompting the jury to find some way to vindicate and compensate the employees.⁶⁹

Thus bad faith may be equated with malice, or with lack of good cause, or with ulterior motives, or with shoddy behavior.

3. *Consequences of Breach*

The major consequences of breach of the covenant are as clear as the definition of good faith is unclear. In *Wild*, the court quite clearly rejected the possibility of a tort cause of action and hence tort damages; any malicious motive the employer might have would go only to whether there was a

63. See *supra* text accompanying notes 53–58.

64. 389 N.W.2d 876 (Minn. 1986).

65. *Id.* at 890–92.

66. *Id.* at 890.

67. *Id.* at 895.

68. *Id.* at 893 (Simonett, J., dissenting).

69. *Id.* at 893, 895 (Kelley, J., dissenting).

material breach of contract.⁷⁰ Furthermore, in *Eklund*, the court of appeals limited the employee's damages on remand to compensatory damages, also rejecting a claim for punitive damages.⁷¹ Presumably the appropriate measure of contract damages is that used in unilateral contract cases: essentially, lost wages.⁷²

Nearly all of Minnesota law⁷³ on the covenant of good faith and fair dealing has been created during the past five years. In that time, the courts have answered some questions clearly, others not. Part II assesses the courts' handling of these cases and makes several recommendations.

II. THE COVENANT OF GOOD FAITH AND FAIR DEALING FOR THE 1990s

The chief difficulty with Minnesota law on good faith in employment is that the courts have thus far avoided the "judicial incursions into the amorphous concept of bad faith."⁷⁴ This inquiry is not as fearsome as it might seem, as there is law from other contexts to draw upon. Furthermore, one relatively narrow definition would fill a troublesome gap in employment law without creating a major shift in the law on job security. The latter task would still be left for the legislature.

A. "Good Faith" as an Undefined Term

As developed above,⁷⁵ both the supreme court and the court of appeals thus far have focused on when and how the cove-

70. *Wild v. Rarig*, 302 Minn. 419, 442, 234 N.W.2d 775, 790 (1975), *cert. denied*, 424 U.S. 902 (1976).

71. *Eklund v. Vincent Brass & Aluminum Co.*, 351 N.W.2d 371, 379 (Minn. Ct. App. 1984) (analyzing Minnesota's punitive damages statute, MINN. STAT. § 549.20 (1982)).

72. See *Pine River State Bank v. Mettelle*, 333 N.W.2d 622, 632 (Minn. 1983) (citing *Zeller v. Prior Lake Public Schools*, 259 Minn. 487, 493, 108 N.W.2d 602, 606 (1961)) ("the measure of damages for breach of an employment contract is the compensation which an employee who has been wrongfully discharged would have received had the contract been carried out according to its terms").

73. For examples of federal court decisions applying Minnesota law, see *Buyse v. Paine, Webber, Jackson & Curtis, Inc.*, 623 F.2d 1244 (8th Cir. 1980); *Jeffers v. Convoy Comp.*, 636 F. Supp. 1337 (D. Minn. 1986); *Corum v. Farm Credit Servs.*, 628 F. Supp. 707 (D. Minn. 1986).

74. *Hunt v. IBM Mid America Employees Fed. Credit Union*, 384 N.W.2d 853, 858 (Minn. 1986) (quoting *Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 377, 652 P.2d 625, 629 (1982)).

75. See the text accompanying notes 59 through 69 *supra*.

nant of good faith is created; the holdings in the good faith cases go to that issue. By contrast, the definition of good faith is an incidental part of the court's reasoning, where the court generally has incorporated the suggestions of the parties. As a result, the definition of "good faith" is neither clearly articulated nor fully developed and varies from case to case.

At first glance, it may seem efficient to decide whether a cause of action exists before determining its elements and nuances. But there are two serious consequences of the courts' current sequence of analysis.

First, the lack of a definition is bound to create problems for the lower courts and litigants. The appellate courts have determined that the covenant of good faith may indeed exist given the right facts and circumstances.⁷⁶ How are trial courts and lawyers to give meaning to the term "good faith" as they handle these cases? How are they to know whether the circumstances suffice to imply the covenant if the definition of the covenant is unclear?⁷⁷

Second, the courts should not reject or recognize a cause of action without knowing what they are rejecting or recognizing.⁷⁸ There is simply too great a risk of making the wrong decision on such an unformed basis. A court must seriously grapple with what a cause of action would entail in order to make such judgments as whether the claim is too open-ended, too radically alters the current system, duplicates existing legal rules, or is otherwise unwise.

In other areas of employment law, the Minnesota Supreme Court has engaged in this thorough analysis. In *Lewis*, for example, the court recognized self-publication for defamation purposes and in doing so provided substantial insight into the workings of the cause of action as well as the court's reasons for recognizing this principle.⁷⁹ The court has engaged in much the same analysis in creating the tort of intentional inflic-

76. See the text accompanying notes 52 through 58 *supra*.

77. Even if the courts had declined to recognize the covenant of good faith altogether, a similar problem would arise: litigants would need to know precisely what theory had been rejected in order to know which theories remained available.

78. It could be that the courts have had a clearer idea of what the covenant means than the opinions convey. If that is so, the major difficulty is that the persons guided by the courts' decisions are not well-informed.

79. *Lewis v. Equitable Life Assurance Soc'y*, 389 N.W.2d 876, 886-87 (Minn. 1986).

tion of emotional distress⁸⁰ and the unilateral contract theory employed in personnel handbook cases.⁸¹

Perhaps the courts⁸² have faltered in defining good faith because it truly is an amorphous concept. As the next two parts show, however, there are well-developed formulations to be considered.

B. Possible Definitions of "Good Faith"

There are several possible definitions of "good faith" in the context of employment, although most entail some difficulty.⁸³

The *Hunt* court seemed to equate "good faith" with good cause to discharge.⁸⁴ This term is not defined in the opinion or elsewhere in Minnesota law regarding at-will employees.⁸⁵ There is, however, a well-developed body of "law" defining "good" or "just cause" in the opinions of arbitrators construing union-management contracts. Arbitrators focus on the misconduct of the employee in light of the employee's work record, weighed against the employer's right to manage the workforce. They also examine the employer's compliance with "due process" principles.⁸⁶

This definition would provide substantial protection to em-

80. See *Hubbard v. UPI*, 330 N.W.2d 428, 437-38 (Minn. 1983).

81. See *Pine River State Bank v. Mettelle*, 333 N.W.2d 622, 627 (Minn. 1982).

82. The Minnesota courts are not alone in avoiding this difficult issue. For one of the more prominent examples from another state, see *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988). But see *Metcalf v. Intermountain Gas Co.*, 116 Idaho 622, 778 P.2d 744 (1989) (both recognizing and fairly clearly defining the covenant of good faith in an employment context).

83. For general insights into the challenge of defining "good faith," see Gillette, *Limitations on the Obligation of Good Faith*, 1981 DUKE L.J. 619; Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810 (1982).

84. See text and citation *supra* note 54.

85. Cf. MINN. STAT. § 268.09, subd. 1 (Supp. 1989) (definitions of misconduct disqualifying terminated employees from receipt of unemployment compensation benefits). Probably the most prominent definition of good cause in the case law on non-unionized employees is found in *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 330, 171 Cal. Rptr. 917, 928 (1981) ("a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power"; "the employer must of necessity be allowed substantial scope for the exercise of subjective judgment" in the case of high-level employees). It is interesting that this definition is rather loosely drawn.

86. "Due process" principles include fair notice, equal treatment, and hearing procedures which include the rudiments of trial-type protections. See generally Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 499-508 (1976).

employees—more substantial than that called for in other more standard concepts of good faith (which are described below). As argued in part D below, such a drastic change in the law on job security should come from the legislature.

Other formulations of “good faith” would focus on the employer’s mindset. The court in *Wild* alluded to malice, for example.⁸⁷ This formulation calls to mind the comments to the Restatement of Contracts⁸⁸ which incorporate the standard of “honesty in fact” found in the Uniform Commercial Code.⁸⁹

However a mindset requirement is phrased, it raises evidentiary problems in employment cases. In many employment situations, the employer is not a single person, but rather several people occupying various positions—and holding various opinions and motives. Most employers would not leave clear evidence of malicious or dishonest motives.⁹⁰ These evidentiary difficulties appear quite clearly in the areas of employment law which do focus on the employer’s motivation, such as discrimination.⁹¹ While these problems may be unavoidable where the law’s precise design is to shape an employer’s mindset,⁹² the law of good faith need not be so drawn.

A third reference point for the definition of good faith is the disparity between the defendant’s conduct and some measure of community standards. The comments to the Restatement note that bad faith actions “violate community standards of decency, fairness or reasonableness.”⁹³ Similarly, the Uniform Commercial Code calls for “observance of reasonable commercial standards of fair dealing in the trade.”⁹⁴

The notion of community standards is problematic in the context of employment. Some employees enjoy considerable

87. See text and citation *supra* note 59.

88. RESTATEMENT (SECOND) OF CONTRACTS § 205 comment a (1979).

89. U.C.C. § 1-201(19) (1989).

90. At least, one would not expect such a “paper trail” once the legal rules became set and widely known.

91. The clearest example appears in the recent decisions of the United States Supreme Court interpreting the federal statute barring employment discrimination: *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989); *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989).

92. Minnesota’s “whistleblower act” and Human Rights Act both prohibit discharges “because” of certain protected activity. See MINN. STAT. §§ 181.932, subd. 1, 363.03, subd. 1 (1988 & Supp. 1989).

93. RESTATEMENT (SECOND) OF CONTRACTS § 205 comment a (1979).

94. U.C.C. 2-103(1)(b) (1989).

job security through contracts or civil service statutes.⁹⁵ Should that standard apply where the agent leading to those protections (the union, the government) is not present? Within the at-will sector, there no doubt is a wide range of standard practices among employers, reflecting varying business conditions, management theories, and supervisor personalities. Furthermore, employees may not share the standards of employers. Thus, the standard of "decency, fairness or reasonableness" is likely to prove elusive.⁹⁶

These subjective and objective tests of good faith are potentially troublesome for another reason. Breach of the covenant presumably would be a contract cause of action, adjudicated by a jury. Whether the employer is held to a standard requiring a proper mindset or a standard set by community mores, the jury is unlikely to find good faith if the employer has not shown good reasons for firing the employee. Therefore, to meet these tests, an employer may be compelled as a practical matter to prove good cause for the discharge. Furthermore, an employer operating under either of these tests is likely to make discharge decisions as though it were governed by a just cause rule. As argued below, a rule requiring just cause should emanate from the legislature (if at all).

Finally, some commentators see the need for a definition of good faith tailored to employment law. One of the more interesting analyses cites the employer's unbridled exercise of discretion as the factor requiring regulation, because it carries the potential for arbitrary action.⁹⁷ The proposed solution is to institute peer review of dismissals and notice of termination commensurate with an employee's length of service.⁹⁸ Another commentator has proposed a sliding-scale analysis, in which an assessment of good faith rests in part on such factors as the employee's tenure and position.⁹⁹ As intriguing as these ideas are, they would be beyond the reach of the courts.

95. See text accompanying notes 24 through 26 *supra*.

96. Of course, it may be relatively easy to judge conduct that is clearly out-of-bounds. See *Hubbard v. UPI*, 330 N.W.2d 428 (Minn. 1983) (applying the tort of intentional infliction of emotional distress).

97. Note, *Ensuring Good Faith in Dismissals*, 63 TEX. L. REV. 285, 286 (1984) (authored by Kenneth A. Clark).

98. *Id.*

99. Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1840-41 (1980).

C. The Preferred Definition of "Good Faith"

There remains one definition in the comments to the Restatement of Contracts which holds promise for the employment setting: "faithfulness to an agreed upon common purpose and consistency with the justified expectations of the other party."¹⁰⁰

This approach is exemplified by cases such as *Bratton*¹⁰¹ and the major cases cited in *Bratton* and *Fortune v. National Cash Register Co.*¹⁰² In *Fortune*, the employer demoted and then fired an employee in such a way as to deprive him of commissions on sales he had secured. Although the employer's actions did not breach the commission agreement, the court found that a jury should review the case for breach of the covenant of good faith.¹⁰³

This rationale of faithfulness to an agreed upon common purpose and consistency with justified expectations is not necessarily confined to situations where the employer deprives the employee of the clear monetary benefits of the bargain, but extends as well to other aspects of the employment relationship.¹⁰⁴ Promises relating to the bases for termination or procedures to be used¹⁰⁵ should qualify, as would systems for evaluating and disciplining employees prior to termination. These non-monetary benefits and advantages are valuable to

100. RESTATEMENT (SECOND) OF CONTRACTS § 205 comment a (1979). The comments also include "evasion of the spirit of the bargain" in the catalogue of bad faith behaviors. *Id.* at comment d. See also Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 373 (1980) (advocating a test that focuses on the exercise of a party's discretion for any purpose within the parties' reasonable contemplation at the time of contracting).

101. *Bratton v. Menard, Inc.*, 438 N.W.2d 116, 119 (Minn. Ct. App. 1989). See *supra* notes 55-57, and accompanying text.

102. 373 Mass. 96, 364 N.E.2d 1251 (1977). (*Fortune* is cited in the reporter's note to § 205 of the Restatement of Contracts.)

103. *Fortune*, 373 Mass. at 106, 364 N.E.2d at 1258. It is interesting that the court analyzed the situation in terms of the employer's apparent motive to deprive the employee of commissions earned.

104. See *Metcalf v. Intermountain Gas Co.*, 116 Idaho 622, 625, 778 P.2d 744, 747 (1989) (reversing summary judgment to determine whether a policy that accumulates sick leave benefits implies an agreement not to terminate an employee for using those benefits).

105. See *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 765 P.2d 373, 389, 254 Cal. Rptr. 211, 227 (1988) (resting the implied covenant of good faith on oral promises of job security). It may well be that the Minnesota Supreme Court holds this vision of the covenant—and would not extend its reach to protect other promises. See the discussion in part I B *supra*.

employees, although they may not be quantifiable. They are very much a part of the attraction of the job and may indeed be "bought" through reduced monetary compensation.¹⁰⁶ Where such bargains exist, the employer would be obligated to act in faithfulness to them and refrain from discharges which would deprive the employee of the bargain's benefits.

A major consideration under this approach is the identification and recognition of the bargain on which the employee's claim rests. If the claim derives from an agreement pertaining to job security per se, the court may wish to apply the rules developed for standard contract causes of action. The standard for unilateral contracts created in employee handbooks, for example, is that the promise must be "definite," and more than a mere statement of general company policy.¹⁰⁷ Claims based on other agreements (such as *Fortune's* commission agreement) may be recognized more readily.¹⁰⁸ Of course, any statement preserving the at-will posture should operate to rebut the existence of a bargain for purposes of the covenant of good faith, as *Knudsen* teaches.¹⁰⁹ In other words, the rules developed elsewhere in employment law for discerning bargains would carry over to the covenant of good faith for purposes of establishing whether there is "an agreed upon common purpose" or "justified expectations."

The good faith cause of action would diverge from other contract causes of action in the assessment of actions deemed justified according to the bargain. The employer would be liable not only for breaches of the promises made but also for actions inconsistent with or not faithful to the bargain. A technical defense on the contract which would prevail against a

106. See Flanagan, *The Price of Labor and Its Value*, The Park City Papers 292 (1985) (presented at the Labor Law Group Conference on Labor and Employment Law in Park City, Utah, June 29-July 1, 1984), reprinted in M. ROTHSTEIN, A. KNAPP & L. LIEBMAN, *supra* note 9, at 344.

107. The seminal case is *Pine River State Bank v. Mettille*, 333 N.W.2d 622 (Minn. 1983). As this rule has evolved, it appears that the court generally requires both forceful and specific language. See *Goodkind v. University of Minnesota*, 417 N.W.2d 636, 640 (Minn. 1988); *Lewis v. Equitable Life Assurance Soc'y*, 389 N.W.2d 876, 883 (Minn. 1986); *Hunt v. IBM Mid America Employees Fed. Credit Union*, 384 N.W.2d 853, 856-57 (Minn. 1986).

108. Definiteness seems less critical when terms other than job security are involved, because the court seems less concerned that the employer is waiving one of its critical rights (namely the at-will rule).

109. *Knudsen v. Northwest Airlines, Inc.*, 450 N.W.2d 131 (Minn. 1990).

contract claim would not stave off a claim based on the covenant of good faith.

This moderate approach should be attractive to both those who would impose greater duties on employers and those who would protect managerial prerogatives. This rule would prohibit a narrow range of terminations which—although not a violation of statute, tort, or breach of contract—are nonetheless troublesome. They are troublesome because they are antithetical to the bargain, and they should be treated as such, rather than made to fit some other theory of wrongful discharge.¹¹⁰ It is not too much to expect actions consistent with the bargain where the relationship is potentially long-term, intimate, and of great significance to the employee,¹¹¹ if not also the employer.¹¹²

On the other hand, core managerial prerogatives are preserved. The good faith obligation would be clearly rooted in the bargain between the employee and the employer—in their “agreed upon common purposes” and their “justified expectations.” Any good faith covenant that would arise thus would be of the parties’—including the employer’s—own making. Indeed, the employer would in most cases be the primary architect of the bargain. The parties would remain free, for whatever reasons, to avoid a bargain of a particular sort. This approach thus preserves managerial prerogatives and the autonomy of the contracting parties¹¹³ at the most critical time—when the deal is struck.¹¹⁴

Furthermore, this construction of the covenant of good faith fulfills two useful functions in the overall scheme of employment law. First, as just argued, the covenant would regulate only a narrow range of discharges needing regulation.

Second, the covenant should influence employer conduct during the term of the employment relationship. For example,

110. See generally Summers, *supra* note 83, at 812.

111. For eloquent testimony to the central role that work occupies in the lives of most people, consult S. TERKEL, *WORKING* (1974).

112. See MacNeil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691, 695 (1974) (arguing that relations, rather than discrete transactions, typify much of commercial life; noting in particular “the increase in white collar salaried employment”).

113. See generally Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984).

114. The deal may be struck at the time of hire or at other times during the employment relationship, as the employee handbook cases demonstrate. See *Pine River State Bank v. Mettelle*, 333 N.W.2d 622 (Minn. 1983).

employers in situations like *Bratton* and *Fortune* would be deterred by the knowledge that wrongful discharge liability may follow from applying those kinds of compensation rules (if not from creating such rules in the first instance).¹¹⁵ This by-product would be a salutary supplement to the law on employer conduct during the term of the relationship. Again it is a limited supplement, which rests on the parties' decision to create an obligation in the first instance.¹¹⁶

There remain two matters to resolve: how the covenant comes into being and the remedies available in case of breach. In effect, the covenant would be created through the simultaneous functioning of the law and the parties' actions. The covenant would exist by force of law—but only when the parties had themselves created some bargain pertinent to the employer's conduct.¹¹⁷

Finally, the consequences of breach should be contract damages, not tort damages. The gist of the cause of action recommended here is not malice or a violation of public policy, but rather conduct that is contrary to the parties' bargain. The theory of the cause of action is contract, not tort; the damages available to the plaintiff¹¹⁸ and the sting felt by the defendant¹¹⁹ should reflect this.

D. *The Task Remaining for the Legislature*

Some may argue that this recommendation offers too little

115. On the topic of the power of the rule of good faith to constrain conduct, see Gillette, *supra* note 82, at 627–31. On the employer's tendency towards opportunism, see Note, *Employer Opportunism and the Need for a Just Cause Standard*, 103 HARV. L. REV. 510 (1989).

116. This rule would be far narrower than a negligence standard, for example.

117. There is some parallel to the rule in Minnesota law that the parties may create the covenant, but the focus is different. It would not be necessary, under the recommended rule to establish an agreement to terminate only in good faith, as appears to be current Minnesota law. It would suffice to establish a commission agreement, performance system, or other bargain "breached" by the discharge.

118. For basic principles on contract damages in wrongful discharge cases, see *Pine River State Bank*, 333 N.W.2d at 632. In some situations, the employee may seek restoration of the benefit lost or compensation for that benefit, rather than damages for the termination itself.

119. For interesting insight into the differences between damages available in a tort-based cause of action and a contract-based cause of action, see Jung & Harkness, *Life After Foley: The Future of Wrongful Discharge Litigation*, 41 HASTINGS L.J. 131, 136–37 (1989) (if breach of the covenant of good faith leads to tort damages, the average award would be \$426,929 compared to \$252,859 if recovery is confined to contract damages).

protection for at-will employees. It is true that there will be little protection where little is bargained for. Perhaps at-will employees should have protections from discharge not based on good cause. But the implied covenant of good faith, a common law cause of action, is not the vehicle for such major law reform.¹²⁰

Rather, as the court hinted in *Hunt*,¹²¹ this judgment is one for the legislature. It is telling that most employees who now enjoy this protection acquired it directly or indirectly through legislation.¹²² Legislators have several advantages over the judiciary in making such a major shift in the law, such as the opportunity for broad public involvement, a "record" which extends beyond the facts of a lawsuit, and the capacity to make prospective rules.¹²³ And the legislature can craft rules with finer shadings than can the courts.

Indeed, the National Conference of Commissioners on Uniform State Laws is considering a preliminary draft of the Employment Termination Act. That act would require that the employer have either just cause or a good faith and reasonable belief that termination is required by a legitimate business interest before terminating an employee with tenure of a year or more.¹²⁴ A bill introduced in the Minnesota legislature would impose the just cause requirement on Minnesota employers.¹²⁵ Both bills would exempt small employers.¹²⁶ Both bills would do far more than change the substantive rules on discharge, however. Both would create systems of enforcement which the courts would be powerless to create, namely procedures which occur for the most part outside the court system and a wide

120. For differing views on the likelihood and wisdom of judicial and legislative action, *compare* Note, 93 HARV. L. REV., *supra* note 99, at 1837-39 with Summers, *supra* note 83, at 492-99.

121. *See supra* note 47 and accompanying text.

122. Civil service protections are statutory in origins. *See supra* note 26. Collective bargaining agreements creating just cause protections are made possible by the National Labor Relations Act, 29 U.S.C. §§ 151-63 (1988), and state labor statutes, *e.g.*, MINN. STAT. chs. 179, 179A (1988 & Supp. 1989).

123. This is not always a bright line, especially where the parties file "Brandeis briefs" or there are amici.

124. NCCUSL UNIFORM EMPLOYMENT TERMINATION ACT § 2(a), (b) (July 1990 draft) [hereinafter NCCUSL Draft].

125. S.F. No. 1654 § 5(b) (introduced May 18, 1989 by Senators Freeman and Piper).

126. NCCUSL Draft § 1(2); S.F. No. 1654 § 2(5).

range of equitable and monetary remedies.¹²⁷

Meanwhile, the courts should proceed with caution. The courts have done much to increase the job security of at-will employees in the past decade.¹²⁸ It may be useful to allow employers and employees to assimilate these new rules and to discover the bargains they wish to strike now that they understand that their bargains are indeed enforceable.¹²⁹

CONCLUSION

How would the suggestions made in this essay affect the resolution of the scenario set forth in the introduction?

More likely than not, the employee's case would rule that no covenant exists by force of law. Because the facts do not suggest an agreement between the parties requiring the employer to have good cause or good faith reasons for discharge, the court probably would find that the parties did not create a covenant to act in good faith through their statements and actions under their circumstances. The case most likely would not reach the jury. What would constitute good faith in this situation would probably never be addressed.¹³⁰

Under the approach recommended here, on the other hand, the case may reach the jury. The court would first assess whether the parties had come to a bargain on the matter of performance evaluations—the underlying point of contention between parties. This analysis might track the analysis used to determine whether a contract creating job security exists (that is, whether there has been a definite offer)¹³¹ or the court might use a less rigorous standard.¹³²

The employee then would argue that the employer “fail[ed] to act consistently with [his] justified expectations” implicit in

127. See NCCUSL Draft §§ 5–8; S.F. No. 1654 §§ 6–7.

128. Many of the cases and some of the statutes described in part I A(3) are less than a decade old. See *supra* notes 23–37 and accompanying text.

129. It is not only the covenant of good faith but also such relatively “new” rules as unilateral contract theory applied to employee handbooks and promissory estoppel which have created this new system. See *supra* notes 35–36 and accompanying text.

130. This description basically tracks the May 2, 1989 order and memorandum of Judge Petersen in the *Makhsoos* case discussed *supra* note 1 and accompanying text.

131. See *supra* note 47 and accompanying text.

132. There is no clear statement establishing employment at-will. If there were, the covenant would be rebutted.

that bargain.¹³³ Presumably the employee would argue that he justifiably expected that his performance evaluations would reflect the actual assessments made by his supervisors. Therefore his termination, as well as the supervision he received, deprived him of the intended benefits of the evaluation system—namely an opportunity to fully appreciate his weaknesses and work on them.¹³⁴ The employer would argue either that the employee expected too much¹³⁵ or that the employer fulfilled the employee's justifiable expectations, e.g., by providing informal critique and less-than-standard evaluations.

This approach thus would create a limited cause of action, based on the covenant between the employer and the employee. It would fill a relatively small, but noteworthy gap in Minnesota employment law and has solid antecedents in the law of contracts. Furthermore, the courts no longer would be "working backwards" under this approach, since they would simultaneously recognize a cause of action and provide its parameters. The critical task of definition would not lag behind the recognition of the cause of action. Finally, under this approach, the law would not directly regulate certain improper terminations, but it would also reach back to regulate indirectly certain improper actions during the term of employment.¹³⁶ Both forms of regulation should be welcomed by employees and accepted by employers who truly intend to carry out their bargains with employees.

133. See RESTATEMENT (SECOND) OF CONTRACTS § 205 comment a (1979).

134. There may be overtones of the honesty principle in this part of the case.

135. The employer may introduce evidence of how other employees understood the system to operate, for example.

136. In the hypothetical, for example, the employer's practices under its performance assessment system would receive scrutiny.

